

REMARKS

Summary of Office Action

As an initial matter, Applicants note with appreciation that the Examiner appears to have withdrawn the rejection of claims 1-25, 28-34, 36, 37 and 40-46 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Giret et al., U.S. Patent No. 5,776,872.

Claims 1-16, 18-32, 34-37 and 40-48 are newly rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Fowler et al., U.S. Patent No. 5,720,961 (hereafter “FOWLER”) in view of Gordon et al., U.S. Patent No. 5,977,039 (hereafter “GORDON”) and Mercier et al., U.S. Patent No. 7,488,471 (hereafter “MERCIER”).

Claims 17 and 33 are newly rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over FOWLER in view of GORDON, MERCIER and McLaughlin, US 2003/0133900 (hereafter “McLAUGHLIN”).

Response to Office Action

Reconsideration and withdrawal of the rejections of record are respectfully requested, in view of the following remarks.

Response to the Rejection over FOWLER, GORDON and MERCIER

Claims 1-16, 18-32, 34-37 and 40-48 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over FOWLER in view of GORDON and MERCIER. The rejection essentially alleges that FOWLER teaches or suggests most of the elements which are recited in the rejected

claims. The Examiner concedes that FOWLER does not teach the instantly claimed viscosity range, does not teach the instantly claimed amount of polymeric thickener and does not exemplify the instantly claimed amount of the paraffin oil (i) and paraffin oils (ii) in the cleansing composition but takes the position that these deficiencies of FOWLER are cured by GORDON and MERCIER.

Applicants respectfully traverse this rejection. In particular, present claim 1, for example, recites

- (A) a cosmetic or dermatological cleansing emulsion which comprises
 - (B1) from 2 % to about 17 % by weight of
 - (B2) at least one of sodium laureth sulfate and sodium myreth sulfate;
 - (C1) from about 0.20 % to about 0.74 % by weight of
 - (C2) one or more polyacrylates selected from anionic homopolymers and anionic copolymers of at least one of acrylic acid, an alkylated acrylic acid and esters thereof;
 - (D) from 42 % to about 51 % by weight of an oil phase comprising
 - (E1) from about 25 % to about 50 % by weight of
 - (E2) a paraffin oil,
 - (F1) from about 0.5 % to about 25 % by weight of
 - (F2) one or more oils having a polarity of from about 5 to about 50 mN/m;
 - (G) the emulsion having a viscosity of from about 500 to about 3,500 mPa s at 100 s⁻¹.

FOWLER discloses hundreds of surfactants and types of surfactants (see col. 5, line 55 to col. 10, line 33 of FOWLER) and hundreds of emollients and types of emollients (see col. 10, line 48 to col. 13, line 6 of FOWLER) which are suitable for use in the compositions disclosed therein,

giving rise to millions of possible combinations of surfactants and emollients. Moreover, thickeners are mentioned in FOWLER only as optional components of the compositions disclosed therein. A lengthy list of examples of specific thickeners that may be employed is found in col. 13, lines 49-62 of FOWLER. It is not seen that despite this high number of possible combinations of surfactants, emollients and (optional) surfactants FOWLER renders it obvious to employ the specific combination of these components that is recited in the instant claims, let alone in the recited weight percentages.

In this regard, the Examiner is reminded that the fact that a claimed species or subgenus is encompassed by a prior art genus is not sufficient by itself to establish a *prima facie* case of obviousness. *In re Baird*, 16 F.3d 380, 382, 29 USPQ2d 1550, 1552 (Fed. Cir. 1994) ("The fact that a claimed compound may be encompassed by a disclosed generic formula does not by itself render that compound obvious."); *In re Jones*, 958 F.2d 347, 350, 21 USPQ2d 1941, 1943 (Fed. Cir. 1992) (Federal Circuit has "decline[d] to extract from *Merck [& Co. v. Biocraft Laboratories Inc.*, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir. 1989)] the rule that... regardless of how broad, a disclosure of a chemical genus renders obvious any species that happens to fall within it."). See also *In re Deuel*, 51 F.3d 1552, 1559, 34 USPQ2d 1210, 1215 (Fed. Cir. 1995). See also MPEP 2144.08 II.

The lack of a teaching or suggestion of the instantly claimed combination is illustrated by the Examples of FOWLER and in particular, by Examples 2, 3 and 5 of FOWLER which are specifically relied upon by the Examiner:

The composition of Example 2 shows only four of the elements recited in instant claim 1,

i.e., the above elements (C1), (C2), (F1) and (F2), elements (C1) and (F1) being only barely met.

The composition of Example 3 of FOWLER shows only element (B2); the composition of Example 5 shows only elements (A), (E2), (F1) and (F2).

Accordingly, even a (hindsight) combination of specific elements of Examples 2, 3 and 5 of FOWLER would result in a combination of only the above elements (A), (B2), (C1), (C2), (E2), (F1) and (F2), i.e., without elements (B1), (D), (E1) and (G).

Applicants further point out that the compositions of Examples 2, 3 and 5 of FOWLER have in common that they contain large amounts of water, i.e., at least about 79 % by weight. This is consistent with the disclosure in col. 13, lines 9-15 of FOWLER, according to which the compositions disclosed therein most preferably have a water content from about 70 % to about 90 %.

In contrast, in view of elements (B1), (C1) and (D) the water content of the claimed emulsions cannot be higher than about 56 %. In this regard, see also instant claims 47 and 48.

Regarding element (A), it further is pointed out that FOWLER mentions emulsions only as one of several forms in which the skin cleansing compositions disclosed therein can be present; see, e.g., col. 2, lines 58-65 of FOWLER. Further, only one of the seven exemplified compositions is indicated to be an emulsion (Example 5).

Regarding element (B1) it is pointed out that in col. 5, lines 23-29 thereof FOWLER mentions that the compositions disclosed therein comprise from about 0.05% to about 40%, preferably from about 0.10% to about 20%, more preferably from about 0.5% to about 15%, and most preferably from about 1% to about 10% of a surfactant selected from the group consisting of

nonionic surfactants, anionic surfactants, cationic surfactants, amphoteric surfactants, zwitterionic surfactants, and mixtures thereof. In other words, the ranges for the surfactant concentration disclosed by FOWLER do not apply solely to anionic surfactants, let alone to sodium laureth sulfate and/or sodium myreth sulfate (sodium myreth sulfate is not even mentioned in FOWLER). Rather, they refer to the totality of surfactants that are to be employed.

This is illustrated by, e.g., Example 3 of FOWLER wherein four different surfactants are employed in a total concentration of 7.40 % by weight. Sodium laureth sulfate is employed in only a relatively small amount (0.40 %), i.e., only about 20 % of the lower concentration recited in claim 1, and in a significantly smaller concentration than each of the remaining three surfactants. A reason therefore may be that ethoxylated emulsifiers are considered to be somewhat irritating to skin and eyes. In this regard, see, e.g., col. 2, lines 62-66 of MERCIER.

Regarding the above element (D) it is noted that as already pointed out above, FOWLER prefers relatively high water contents, most preferably at least about 70 % by weight, which makes it impossible for the oil phase to be present in concentrations of at least 42 % by weight.

It further is pointed out that according to col. 10, lines 36-47 of FOWLER the compositions disclosed therein comprise from 0% to about 50%, preferably from about 0.1% to about 20%, and most preferably from about 0.5% to about 10% of an emollient, the term emollient including not only conventional lipid materials (e.g., fats, waxes, and other water insoluble materials) but also polar lipids (e.g., lipid materials which have been hydrophylically modified to render them more water soluble), silicones, hydrocarbons, and a wide variety of solvent materials.

Accordingly, FOWLER teaches that the total concentration of all types of emollients in the compositions disclosed therein preferably is considerably lower than 42 % by weight. Additionally, FOWLER fails to teach or suggest that a combination of the materials recited in, e.g., instant claim 1 is to be employed, let alone in the concentrations recited therein.

For example, the only exemplified composition of FOWLER which comprises mineral oil, i.e., the composition of Example 5, comprises only a very small percentage thereof (1.40 %), i.e., less than 8 % of the concentration of mineral oil that is employed according to the present invention. Also, the total concentration of mineral oil and other oils in the composition of Example 5 is less than 5 %, i.e., only about 10 % of the smallest concentration of the oils recited in instant claim 1 (element (D)).

Regarding the above elements (C1) and (C2) it is pointed out again that according to FOWLER the presence of (any) thickener is only optional. FOWLER does not even provide a concentration range for the thickener(s). Further, the only Example of FOWLER which comprises a thickener of the type recited in claim 1 is Example 2. The thickener is present in a concentration which is right at the lower end of the concentration range recited in instant claim 1. Moreover, the corresponding composition comprises about 86 % by weight of water and does not comprise any of sodium laureth sulfate, sodium myreth sulfate, and mineral oil. Moreover, cetyl alcohol is present in this composition in a concentration of 0.50 % by weight, which again is right at the lower end of the corresponding concentration range that is recited in claim 1.

It is not seen that GORDON and/or MERCIER are able to cure any of the above-noted

deficiencies of FOWLER, even if one were to assume, *arguendo*, that one of ordinary skill in the art would be motivated to combine FOWLER with one or both of GORDON and MERCIER.

In this regard, it is noted that the Examiner appears to rely upon GORDON merely because GORDON allegedly teaches compositions that comprise surfactants, oils and, optionally, thickeners and may have a viscosity within the broad range of 500 to 60,000 mPa s, which range (almost unavoidably) overlaps the viscosity range that is recited in, e.g., instant claim 1 (see the above element (G)). It is noted that the range recited in instant claim 1 accounts for less than 10 % of the viscosity range disclosed in GORDON.

MERCIER appears to be relied on by the Examiner merely because this document allegedly teaches a cosmetic or pharmaceutical emulsion that may optionally comprise polymeric additives to achieve a desired viscosity, examples of these additives allegedly including acrylate polymers in an amount of from 0.1 to 2.5% of the composition.

Accordingly, neither GORDON nor MERCIER cures the deficiencies of FOWLER with respect to the above elements (A) to (G).

It is submitted that for at least all of the foregoing reasons, FOWLER in view of GORDON and MERCIER fails to render obvious the subject matter of any of the rejected claims, wherefore the rejection of claims 1-16, 18-32, 34-37 and 40-48 under 35 U.S.C. § 103(a) over these documents is without merit and withdrawal thereof is warranted.

Response to the Rejection over FOWLER, GORDON, MERCIER and McLAUGHLIN

Dependent claims 17 and 33 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over FOWLER in view of GORDON, MERCIER and McLAUGHLIN. The rejection concedes that FOWLER fails to teach the use of soybean and almond oil as emollients but alleges that this deficiency of FOWLER is cured by McLAUGHLIN.

This rejection is respectfully traversed as well. In particular, (also) McLAUGHLIN is unable to cure the deficiencies of FOWLER discussed above, wherefore claims 17 and 33 are not rendered obvious over FOWLER in view of GORDON, MERCIER and McLAUGHLIN for at least all of the reasons which are set forth above in connection with the rejection of claims 1-16, 18-32, 34-37 and 40-48 as allegedly unpatentable over FOWLER in view of GORDON and MERCIER.

CONCLUSION

In view of the foregoing, it is believed that all of the claims in this application are in condition for allowance, which action is respectfully requested. If any issues yet remain which can be resolved by a telephone conference, the Examiner is respectfully invited to contact the undersigned at the telephone number below.

Respectfully submitted,
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/Heribert F. Muensterer/

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